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FILED
NOV 20 1998
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SUPREME COURT, U.S.

No. 98-366

In The

Supreme Court of the United States

October Term, 1998

DAVID R. McKUNE, WARDEN,
CHARLES SIMMONS, SECRETARY OF CORRECTIONS,

Petitioners,

v.

MARK L. STELTZLEN,

Respondent.

On Petition For A Writ Of Certiorari To The Kansas Court Of Appeals

PETITIONERS' REPLY

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REASONS FOR GRANTING THE WRIT

I. Whether Ministerial State Prison Regulations Are "Laws" For *Ex Post Facto* Purposes Is An Unsettled And Important Issue Of Federal Law

The federal question whether ministerial, interpretive prison regulations should be considered "Laws" for constitutional *ex post facto* purposes is important but remains unsettled. Since *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), this Court has repeatedly emphasized that the constitutional *ex post facto* prohibitions apply to *penal statutes*. The Court has never addressed an *ex post facto* challenge to prison *regulations*.

Moreover, the two *ex post facto* provisions in our Constitution appear in Article I as limitations on *legislative* power. The court below, however, essentially held that all administrative regulations in Kansas necessarily are subject to *ex post facto* requirements, whether or not based on a delegation of legislative authority. With all due respect, petitioners urge this Court to grant review in this case or, alternatively, in the companion cases in No. 98-367, in order to address and resolve this important federal question.

A. This Court's Cases Repeatedly Suggest That Article I's *Ex Post Facto* Prohibitions Limit Only Legislative Abuses, *i.e.*, Penal Statutes Retroactively Applied

The proposition that the state *Ex Post Facto* Clause "has been interpreted to pertain exclusively to *penal statutes*," *Kansas v. Hendricks*, 521 U.S. 346, ___, 117 S. Ct.

2072, 2086 (1997) (emphasis added), goes all the way back to *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). In that early decision, the Justices emphasized that the constitutional prohibitions were designed to preclude abusive exercises of legislative power such as had occurred in England, Europe and, to a lesser extent, in some of the American states.[1] Thus, Justice Chase declared that "the plain and obvious meaning and intention of the prohibition is this: that the legislatures of the several states, shall not pass laws, after a fact done by a subject or citizen, which shall have relation to such fact, and shall punish him for having done it." *Id.* at 390; *see also Miller v. Florida*, 482 U.S. 423, 429 (1987) (observing that *Calder* "emphasized that the Clauses were aimed at preventing legislative abuses").

This history suggests a primary concern with legislative abuses of power. But "it is not a reason for treating parole guidelines as laws to which the rule against ex post facto laws applies." *Prater v. United States Parole*

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[1] Justice Chase, for example, observed that the prohibitions against *ex post facto* laws "very probably arose from the knowledge, that the parliament of Great Britain claimed and exercised a power to pass such laws, under the denomination of bills of attainder, or bills of pains and penalties. . . . " 3 Dall. at 389. Justice Iredell dramatically declared that the "history of every country in Europe will furnish flagrant instances of tyranny exercised under the pretext of penal dispensations. * * * The temptation to such abuses of power is unfortunately too alluring for human virtue; and therefore, the framers of the American constitutions have wisely denied to the respective legislatures, federal as well as state, the possession of the power itself: they shall not pass any *ex post facto* law. . . . " *Id.* at 399-400.

Commission, 802 F.2d 948, 953 (7th Cir. 1986) (en banc) (Posner, J.).

Certainly, state legislatures may delegate legislative authority to prison officials. And the regulations prison officials adopt pursuant to such legislative delegations may well fall within the historical reach of the *ex post facto* prohibitions. But it does not follow that *every* prison regulation that adversely affects some inmates in some way is subject to *ex post facto* scrutiny.

B. The Lower Courts Are Divided On The Importance And Application Of The Distinction Between Regulations Based On Delegated Legislative Authority And Ministerial, Interpretive Regulations

Contrary to respondent's suggestion, petitioners are not asserting that prison regulations promulgated pursuant to delegated legislative authority can never be "Laws" for *ex post facto* purposes. Indeed, as respondent suggests, such a position would permit the state to evade *ex post facto* limitations in the prison context by the simple expedient of making a broad delegation of legislative authority to the department of corrections. Or, in the federal system, Congress could simply delegate legislative authority to establish criminal punishments to a body such as the United States Sentencing Commission.

Recognizing that proposition, however, does not resolve this case, nor does it eliminate the well-established split of authority in the lower courts. Rather, respondent concedes "that the determination of *when* an administrative regulation constitutes a 'law' for Ex Post

Facto purposes may not always be crystal clear," Opp. 7 n. 2, and "we have no dispute that the question of *when* such a regulation is a law is less settled." *Id.* at 10. Indeed, this issue is potentially determinative in this case and it is the very issue that has divided the courts.

For example, after pointing out that "[t]here is some disagreement among the circuits on this matter," *Dominique v. Weld*, 73 F.3d 1156, 1162 (1st Cir. 1996), the First Circuit observed that "[t]he dispute appears to turn on whether a rule is legislative (based on a delegation of statutory authority) or merely interpretive, and whether a legislative rule is binding or merely guides the exercise of discretionary power." *Id.* at 1162 n. 10 (citing and discussing cases). Chief Judge Posner has observed that "[t]he rule against ex post facto laws applies to statutory changes and also (we may assume) to changes in administrative regulations that represent an exercise of delegated legislative authority, as opposed to an interpretation of legislation by an agency authorized to execute, not make, laws." *Prater v. United States Parole Commission*, 802 F.2d 948, 953-54 (7th Cir. 1986) (en banc) (Posner, J.). *See also Ewell v. Murray*, 11 F.3d 482, 487 n. 2 (4th Cir. 1993) (discussing split of authority).

Although this Court has never directly addressed the question of which prison regulations may constitute "Laws" for *ex post facto* purposes, it has acknowledged the distinction between legislative and interpretive rules in this context. In *Miller v. Florida*, 482 U.S. 423, 434 (1987), the Court observed that several Courts of Appeal had upheld federal parole regulations against *ex post facto* challenge, relying on the following three rationales: (1) federal parole guidelines are not "laws" for *ex post facto*

purposes; (2) the parole guidelines merely "rationalize the exercise of statutory discretion"; and (3) retrospective application of the parole guidelines does not result in a more onerous punishment. *Id.* at 434-35. The Court then discussed these rationales in *Miller* (involving a change in Florida's sentencing guidelines) but concluded that "[n]one of the reasons given in the federal parole cases even arguably applies here." *Id.* at 435.

With all due respect, as discussed in the petition for writ of *certiorari* in No. 98-367, at pages 24-25, all three of the foregoing rationales apply to the Kansas regulations.

C. Whether A State Prison Regulation Is A "Law" For Constitutional *Ex Post Facto* Purposes Necessarily Is A Federal Question

Respondent's brief does not make clear whether he views the question in this case as one of federal or state law. *See* Opp. 10-11. But he suggests that it be answered as a matter of state law, asserting that "prudential considerations argue for deference to the State's own characterization of its administrative rules." Opp. 10. This cannot be correct.[2]

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[2] Even were the Court to adopt this approach, it is not clear the issue is so clear cut as respondent suggests. Although the state court of appeals concluded that administrative regulations have the force of law, it does not follow that all such regulations are necessarily legislative in character, as opposed to interpretive or ministerial. Indeed, the prison regulations themselves require only that, for parole eligibility and conditional release purposes, prison officials apply the "statutes" in effect at the time of an inmate's crime. K.A.R.

Taken literally, respondent's suggested approach – defer to the State's characterization of its administrative regulations – could permit a state court, legislature or perhaps even department of corrections to declare that all of the state's prison regulations are purely ministerial or interpretive. Apparently, under respondent's approach, the courts would defer to this declaration, as suggested by respondent's discussion (and apparent approval) of a Kansas statutory provision that purportedly exempts "hundreds of pages" of prison manuals from *ex post facto* scrutiny. Opp. 11. With all due respect, it seems doubtful that respondent really desires a rule that would permit the Kansas legislature in its next session to eliminate the potential for virtually all future *ex post facto* litigation involving Kansas prison regulations.

II. Like The Court Below, Respondent Fails To Acknowledge Or Address This Court's *Ex Post Facto* Decisions Limiting And Disagreeing With *Weaver v. Graham*, 450 U.S. 24 (1981)

Although respondent concedes that the lower court "relies heavily upon *Weaver*," Opp. 12, respondent neither mentions nor addresses important *ex post facto* decisions that limit *Weaver*. Respondent observes that neither *Weaver* nor *Lynce v. Mathis*, 519 U.S. 433 (1997), "provoked even a single Justice to dissent," Opp. 13, but fails to

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44-6-107(a). They make no mention of applying *regulations* in effect at the time of an inmate's crime. Arguably, this regulation suggests that prison officials view these regulations as interpretive or ministerial rather than the result of a delegation of legislative authority.

acknowledge that at least two Justices reluctantly accepted the outcome in each of those cases and disagreed with the Court's reasoning, as discussed in the petition for a writ of *certiorari* in No. 98-367, at pages 25-28. Moreover, respondent ignores that this Court in *Collins v. Youngblood*, 497 U.S. 37 (1990), and *California Dept. of Corrections v. Morales*, 514 U.S. 499, 506 n. 3 (1995), expressly rejected the *Weaver* court's discussion of the concept of "disadvantage." *Cf. Portley v. Grossman*, 444 U.S. 1311, 1312 (1980) (Rehnquist, J., in chambers) ("the prohibition of ex post facto laws does not extend to every change of law that 'may work to the disadvantage of a defendant.' ") (quoting *Dobbert v. Florida*, 432 U.S. 282, 293 (1977)).[3] *Ex post facto* issues are of great importance to the States, with the States' ever-increasing prison populations. *See* Brief *Amici Curiae* of Ohio, et al. in Nos. 98-366, 98-367 (36 states supporting request for review of these important *ex post facto* issues).

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[3] A Westlaw Insta-Cite check of both *Weaver* and *Lynce* confirms that the lower state and federal courts have struggled in applying these decisions. For example, a check of *Weaver* reveals 18 decisions – from this Court, the Courts of Appeal, and the state courts – that have declined to extend *Weaver* or distinguished it, recognizing that this Court's subsequent decisions have, at least in part, abrogated, disagreed with, called into doubt, or modified *Weaver*. A similar check of *Lynce* reveals that, even though the case was decided less than two years ago, one federal Court of Appeals already has declined to extend it, and six other decisions have distinguished it. For the Court's convenience, this information is included as an appendix to this reply brief.

III. This Case And The Related Cases In No. 98-367 Provide Appropriate Vehicles For This Court To Address These Important, Unresolved *Ex Post Facto* Issues

With all due respect, respondent's suggestion that this case is not an appropriate vehicle by which to address the *ex post facto* issues is without merit. The issues are cleanly raised in this case, and the lower court thoroughly addressed them. Respondent is represented by capable counsel with substantial experience in litigation involving prison inmates and prison issues. And, in addition to Kansas, 36 states have expressed their support for review of these cases to resolve the important *ex post facto* issues they raise.

Nor does respondent's suggestion that the companion cases in No. 98-367 are not appropriate vehicles have merit. In those cases, like this case, the issues are cleanly raised and expressly decided. Although the cases in No. 98-367 also deal with changes in the withholding of good time credits for failure to participate in the Sexual Abuse Treatment Program, that fact may simply counsel in favor of granting those cases (to address all of the issues raised) and holding this petition for disposition pending the outcome.

CONCLUSION

For the foregoing reasons, the reasons stated in the petition and the reasons set forth in the amicus brief filed by Ohio on behalf of 36 states supporting review of these issues, petitioners respectfully request that this Court

grant the petition for a writ of *certiorari* in order to resolve the splits of authority in the lower federal and state courts. In the alternative, petitioners request that the Court grant the petition in No. 98-367, which raises the identical issues, and hold this case for disposition pending the outcome of No. 98-367.

Respectfully submitted,

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November, 1998

APPENDIX
(Results Of Insta-Cite Checks)

***Weaver v. Graham*, 450 U.S. 24 (1981):**

Cases Not Following *Weaver* Dicta

California Dept. of Corrections v. Morales, 514 U.S. 499 (1995)

Cases Recognizing Abrogation Of *Weaver*

United States v. Brechtel, 997 F.2d 1108 (5th Cir. 1993)

State ex rel. Glover v. State, 660 So.2d 1189 (La. 1995)

United States v. Pedrazoli, 45 M.J. 567 (A.F. Ct. Crim. App. 1997)

Amin v. State, 939 P.2d 413 (Alaska App. 1997)

Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997)

Allen v. State, 945 P.2d 1233 (Alaska App. 1997)

Cases Recognizing Disagreement With *Weaver*

Snyder v. State, 965 S.W.2d 121 (Ark. 1998)

Stewart v. Pennsylvania Bd. of Probation and Parole, 714 A.2d 502 (Penn. 1998)

Cases Suggesting *Weaver* Has Been Called Into Doubt

Jones v. Georgia State Bd. of Pardons and Paroles, 59 F.3d 1145 (11th Cir. 1995)

People v. Superior Court, 57 Cal. Rptr.2d 296 (Cal. App. 1996)

Cases Declining To Extend *Weaver*

Hock v. Singletary, 41 F.3d 1470 (11th Cir. 1995)

Hallmark v. Johnson, 118 F.3d 1073 (5th Cir. 1997)

Cases Distinguishing *Weaver*

Ellis v. Norris, 968 S.W.2d 609 (Ark. 1998)

Cases Recognizing *Weaver* Has Been Modified

United States v. Brady, 88 F.3d 225 (3d Cir. 1996)

Puckett v. Abels, 684 So.2d 671 (Miss. 1996)

People v. Fioretti, 63 Cal. Rptr.2d 367 (Cal. App. 1997)

Fletcher v. Williams, 688 N.E.2d 635 (Ill. 1997)

Stansbury v. Hannigan, 960 P.2d 227 (Kan. 1998)

***Lynce v. Mathis*, 519 U.S. 433 (1997):**

Cases Declining To Extend *Lynce*

Hallmark v. Johnson, 118 F.3d 1073 (5th Cir. 1997)

Cases Distinguishing *Lynce*

Alan A. v. Verniero, 970 F. Supp. 1153 (D.N.J. 1997)

Russell v. Gregoire, 124 F.3d 1079 (9th Cir. 1997)

State v. Woodman, 1997 WL 710652 (Ohio App. 1997)

Wilson v. State, 1998 WL 13817 (Tenn. App. 1998)

Wottlin v. Fleming, 136 F.3d 1032 (5th Cir. 1998)

Beasley v. Commissioner of Correction, 50 Conn. App. 421 (1998)